

Endnote

¹ Ibraheem A. Allah M. al-Marzoūqi, *Human Rights In Islamic law*, USA: University of Exeter (Ph.D. Theses), 1990, vol. 2, p. 472.

² Faruq, Al-Nabhan, *Nizām al-Hukm fī al-Islām*, Kuwait: University of Kuwait, 1393 AH/ 1973, p.722.

³ Khan, M. Muhsin, *The Translation of the Meaning of Sahih al-Bukhari Arabic-English*, Ankara: Hilal Yayinlari, 1976, vol. 8, p. 213.

⁴ I. A. M. al-Marzoūqi, op.cit. p. 475.

CHAPTER FIVE

FINDINGS AND CONCLUSION

5.1. The Findings

From our study of rights, its definitions, origins and historical analysis of it, we found the followings:

- (1) There is no individual or social right except through the state's law which requires the state submission to this law (or the *Shari'ah* injunctions) through all its administrative, judicial, or legislative activities. All ruling institutions and bodies of the state abides the rules as equally as the citizens.
- (2) There are basis upon which individual rights are built upon, however there must be some guarantees to assure their applications. Similarly, there are principles to which the state must adhere in order to protect the individual's right from transgression. Among these principles one may cite, separation of power, supervision on the constitutionality of the laws, the judicial control, and the establishment of security, equality and justice.
- (3) Ancient and medieval nations ignored the notion of human rights which establish the pillars of a lawful state. These rights restrict the rules and create a solid barrier for individuals against their authorities.

Our verification of history proves that Islam is the first system to respect man basic right by establishing the foundations of justice and the assurances to achieve it. That was in a time when the ruler was absolute and the individual had no right before him. The notion of human rights was not initially in existence. Therefore, it is essential to admit that Islam is a unique system throughout history. It was a pioneer in establishing the basis of human rights and had applied them perfectly and laid down legal and practical guarantees for their protection.

In the first phase of Islam, we found that the Islamic state of Madinah was established on constitutional principles regulating the authorities and guaranteeing the rights and freedoms as prescribed by Qur'an and *Sunnah*. Within the Charter of Madinah we discover many principles that the modern state adopt in their constitutions and international charters.

Through our analysis of the Islamic sources of right the Qur'an is the prime source as it includes verses about man's rights of life, security and freedom. It also mentioned the rights of the ruler and the ruled, religious minorities and others. The guarantees of such rights are also found in the Prophet's traditions, consensus, analogy and independent reasoning *Ijtihād* of the Muslim scholars.

Concerning the recognition of individual rights and freedoms as one of the basis of the legal state and as its goal, I found the following:

(1) Rights and freedoms system is of a recent origin. Social and economic changes

are based upon them.

(2) Islam proceeds others in recognizing rights and freedoms of individuals in the state. Its injunctions in respect of these rights appear to be very deep rooted in its system as applied in the Islamic state centuries ago before it has ever been discovered by social philosophers.

(3) The research leads us to find out that the Islamic system of rights and freedoms has a dogmatic basis on which it is uniquely based, that is the Islamic Creed or '*Aqidah*'. That makes the state and the individuals aim at one direction which is the preservation of rights and freedoms. The state provides the means for individuals to enjoy them. The people in return wholeheartedly accept all the arrangements and rules laid down by the *Shari'ah* regarding these rights and freedoms. It is in this way that the Islamic system has harmonized between the individuals and governments by unifying their goals above all disputes.

Concerning the nature of rights and freedoms in the Islamic system we found that it has a unique characteristic as follows:

- It is a divine grant and not merely natural rights.
- It is comprehensive of all the rights and freedoms and is general for all the citizens of the Islamic state.
- It is a perfect system and not subject to cancellation.
- Freedoms and rights are not absolute in Islamic system.

Regarding the principle of equality in the Islamic system in comparison with

the modern constitutional jurisprudence, we found the following results:

- Equality is a form of justice. It is mentioned in many verses of the Qur'an. The word justice occurred in more than Thirty (30) places.
- Equality in Islam transcends all human differences of wealth, post, power, colour, birthplace or religion. In Islam there is no distinction between any human because of the above reasons.

We found the same result of equality before the court and its procedures. There is no privilege for a noble or a certain class. Even the head of the Islamic State has to come to the court like any other citizen be he a claimant or a defendant. We found that Islamic history has recorded for us many examples of equality that cannot be found al sew here.

We found also that the right to equality in selecting candidates for government post in Islam differs from modern constitutional jurisprudence. For employment in Islamic system is not a right for individuals. Rather, it is an obligation obligated by the state upon them on the basis of physical ability and honesty.

We also found in our research in equality and obligation that the Islamic system has imposed "*Zakāt*" on Muslims and spared those wealth did not satisfy its prerequisite. In the western system it is considered as a tax. But in Islam it is not only a tax. It is an act of worship and a pillar of Islam that an individual is conscious of the duty of paying it and the consequences of its abstention.

The imposition of tribute (*Jizyah*) upon non-Muslims living in the Islamic state is the true form of equality. Because *Zakāt*, being a religious obligation, should not be imposed on those who do not believe in it. Thus, the tribute is for their protection and security. Forcing them to pay *Zakāt* means forcing them to worship.

What we deduce from our study of the right to work as a basic right for human being is as the followings:

(1) The Islamic *Shari'ah* considers it as a religious task. The word "work" and its derivatives is repeated in the Qur'an 359 times. Allah (s.w.t.) evaluates man's value in this world and the hereafter according to his work. He (s.w.t.) says:

"To all are degrees (or ranks) according to their deeds: for thy Lord is not unmindful of anything that they do."(al-An'ām:132).

(2) Work is a right which clearly appears when the individual finds no work to earn his living and stop asking others. For that Islam makes work a right to every individual and the state has to provide it according to the individual's social status, qualification and physical condition since unemployment can cause instability in various levels. A good example of this is the present Algerian situation where unemployment is one of the major issues, let alone moral degradation, poverty and worsening of living condition. Therefore, the state has to open factories and create macro projects so as to find works for people and deal effectively with their living plight.

We also found that the right to work is recognized by all constitutions, systems and international charters. But we hardly find a single country guaranteeing

this right for individuals. However, the compensation arrangement in Western countries partially fills the gap if compared with under developed countries like Algeria.

In the Islamic *Shari'ah* the state guarantees these rights through encouraging work, allowing trade, industry, encouraging crafts, or supporting the needy and jobless people by using the financial resources derived from treasury, tax revenue, inheritance lands and others. This is what is called as social insurance.

In the third part of the thesis dealing with the assurances of human rights by the legal state and its submission to the law designed for the individuals, we found that the first is the power separation. In comparison with the modern constitutional jurisprudence, we reached the following results:

(1) Separation of power is a guarantee for the state to abide by its laws and preserve its interests. That is a guarantee for the individual's rights and his freedom which is considered as his basic rights. It is also protection against despotism and dictatorship. This concept of the separation of power is best explained by Muntiskyo in the following quotation:

"Every individual with an authority in his hand turns to abuse it. To curb that there must be distribution of that authority as a deterrent to despotism."

(2) We are convinced that the abuse of power is an ethical question. The loss of individual's rights is a result of unethical behavior whereby some abusers of power use it for personal interests on others account. Islam, combining the spiritual and

ethical with the political system manage to guarantee individuals rights by rectifying these manners on a guided educational system.

(3) Islam assures practically the separation of legislative power practiced by jurists from others legal system.

(4) If combination of the two powers has a negative effect on individual's rights and freedoms in the present time, it is not so in the Islamic system. It is a method of achieving freedom and justice and giving what is due to every body when the ruler is one of the guided caliphs or one follows their way. It is thus legally permissible as long as justice is established. If there is no justice then the separation is a must.

In our research in legislative authority we reached the following:

(1) The *Shura* counsel (consultation) as guided by the Qur'an, *Summah*, consensus and independent reasoning serve to preserve people's rights and security in accordance to the principle of containing vices and getting beneficial interests.

(2) We also found that this counsel (*Shūra*) represent people for the sake of protecting their rights before the authority. It is a basic guarantee as the citizen is represented before the high authority and as such, his voice and rights are heard.

In the process of studying the executive power in Islamic system compared to western system in the protection of people's rights we found:

(1) Human rights principles are enshrined in the Islamic *Shari'ah*. It is not allowed for the ruler in executive to transgress its injunctions. Neither he is allowed to misuse his position nor legislate his own laws and enforce them.

(2) The ruler's function in Islam is limited to implementing legal injunctions. Therefore, he is obligated to protect people's rights from the aggression of his nominees or from among the citizens themselves. He is accountable of his wrongdoing before Allah, the nation and the Islamic Law.

(3) After the comparison with the modern constitutional system we came to the fact that the present reality of the systems did not encounter something similar to what we have stated of restrictions and control over the ruler as designed in Islam, where there is no obedience in disobeying the Creator.

In process of analyzing the judicial power and its functions as one of human rights and state submission to the law guarantor, we have recorded the following findings:

(1) The judicial authority in Islam has a guardianship over all the state's citizens from the highest to the lowest level without any privilege or bias.

(2) According to some scholars, judicial authority in the Islamic system is representation of Allah's *Shari'ah*. In other system it is the people's representation.

This indicates the prestige it has in implementing the injunctions over every one. This is what guarantees the individual's rights against despotism of the ruling groups or the privileged.

(3) There is a natural control within the judicial authority and the executive in order to assure that these rights are upheld and protected.

It is the obligation of a leader to supervise on his nominees and judges. The judiciary also has the duty to watch over the executives in respect of any act against individual's rights and freedom. Both efforts pour in the same pool, which is guaranteeing the implementation of Islamic injunctions and protecting individual's rights.

In our comparison of judicial supervision arrangements as one of human rights guarantees and the establishment of the legal state in the Islamic system we arrived to the following conclusion:

(1) The shortcoming of parliamentary and administrative supervision for individuals' rights and freedoms in modern legal state (Western system) has made the judicial supervision a real method for the individuals to enjoy these rights. This is what has made it necessary for the judiciary to be independent and have all privileges to enjoy such independence. In turn, that means the preservation of people's rights and freedoms.

The state with all its institutions, executive, judiciary and legislature submit to the laws in a way for the public interests.

(2) The judicial control in the Islamic state is based on its supervision over the general functions of the authorities. Moreover the *Wilāyat al-Madẓālīm* plays a crucial role in enhancing the protection of rights. On the other hand the system of accountability plays a complementary role in this control.

(3) We also came to the conclusion that Islamic judiciary has legal control over the legality of the laws and the constitution. That means it controls the legislation issued by the *Shura* council. Because what has been mentioned in the Qur'an and the *Sunnah* injunctions is considered as the constitution itself.

A technique of supervision in Islamic law is a result of *Ijtihād*, since the method is not bound by time or place.

(4) We found that the judiciary in Islam has within itself a committee of supervisors. Its main function is to achieve justice and implement the legal injunctions in a way that guarantees the individuals' rights and freedoms.

(5) *Wilāyat al-Madhālīm* or the judiciary of the oppressed in Islam is similar to the administrative judicature in Western system. But its authority is wider as it intends to protect individuals' rights and freedoms, doing justice to civil servants, and implementing judicial laws.

In the end of this part we conclude that judiciary power is systematically balanced. Whith this becomes the prime guarantee for human rights.

After studying Islamic judicial system in comparison with the modern constitutional system, we pointed out some guarantees which contribute to judicial control on authorities. This control is for the sake of protecting people's rights and freedoms, justice and equality and preserving a happy life in the lights of Islam.

Regarding democratic systems and the Algerian constitution we found the following.

(1) The application of the democratic system in an effective way aims to guarantee the legal state and people's rights and freedoms. However the Algerian cancellation of the democratic election of 1991 proved otherwise.

(2) We have also presented sufficient comparison about the means of democracy. Referendum, national voting, suggestion and other rights which guarantee to the individual his political right, or who represents him and voice up his opinions to the high authority.

Finally, we conclude this section with an important conclusion about three assurances uniquely attributed to the Islamic state which are very important for the protection of human rights and the state legal status. Which are:

- (1) The declaration for the principle of dual responsibility in the whole society.
- (2) The religious character of Islamic law built on noble Islamic morality.

(3) Uniqueness of Islam for having a very objective system that serves public interests before individual interests.

Concerning the list of individual, societal, economic rights and freedoms in the Islamic system compared with modern constitutional jurisprudence we submit the following:

(1) The Islamic system guarantees personal freedom such as the right to security, protection, justice, equality, freedom of movement, house sanctity, confidentiality of correspondence, freedom of thought and the right to work. The constitutional declaration of the state of *Madinah* stated most of these personal rights. But the research has led us to the fact that the Islamic systems uniquely different in declaring a right unknown to the modern constitutional jurisprudence. That is stated in the Qur'an and I call it the right of personal gl, upon which all rights and freedoms are based. The Qur'an has made rights for ever body. He (p.b.u.h.) says:

"We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation." (surah, al-Isrā': 50).

Regarding the right to life and security, Islam has guaranteed it for the individual from his birth, even before that since he was a fetus in his mother's womb. It imposes a compensation for abortion and makes it a major crime and considers the life of an individual equal to that of all humanity. Allah (p.b.u.h.) says:

"...that if any slew a person "unless it be forwarder or for spreading mischief in the land" it would be as if he slew the whole People: and if any one saved a life, it would be as if he saved the whole people...."

It has also granted unique privileges for non-Muslims' personal freedoms and rights as we mentioned earlier. We also call upon the modern constitutions to learn from their experiences. Ibn Hazm stated that:

"If those with whom we have no contract come to our land to get a non-Muslim with whom we have a contract, we have to confront them with our weapons and for that contract."

This is the consensus of the *Ummah*.

5.2. CONCLUSION

In conclusion, human rights are guaranteed in Islamic law in its broad sense. In his last ceremony, the Prophet (p.b.u.h.) declared the need for protection of human rights. The teachings of the Prophet regulate, safeguard and highly esteem human rights; so that man is urged to exercise these rights, either as religious and moral virtue or as legal responsibilities. Islamic law provides a more positives mechanism by which those rights to can be achieved and to lessen the possibility of the deprivation or abuse of rights. Consequently, law achieves a greater realm of justice. Those characteristics are pointed out as follows:

(1) Islamic legislation depends basically, on the divine source, that is, the Holy Qur'an and the teachings (*Sunnah*) of the prophet Muhammad (p. b. u. h.).

That basis is understood by virtue of two sorts of advantages in favor of Islamic law:

i. Spiritual quality, which provides in the law an extra dimension of sacredness. Namely, it satisfies the morality of a people and they become more cooperative either with the law or between themselves as a united and happy community.

ii. There is the logical implication that the divine groundwork by being far from human intervention acquires greater stability and impartiality, free from man's selfishness. The law is made more temperate and so characterized more clearly by equity and justice.

Man is granted vicereignty on earth. He is given freedom in the pursuit of his duty before Allah. According to his intellect and within the terms of the principles laid down in the divine sources, man is free, to establish a true legislative jurisdiction. Over the course of history this will attend to the advancing needs of a developing human community.¹

(2) The pre-Islamic divine religions are a great heritage of morality and spiritual values, besides being systems of regulations. Moreover, those religions constitute historical stages of the development of the Islamic states today. Therefore, the non-abrogated rules of previous religions (not abrogated, that is, by a later stage) may be adopted as additional legal sources of Islamic law. They may also extend the range of harmony between Muslims and non-Muslims.

(3) Referring to the logical opinion of Muslim jurists, stressing that the purpose of Islamic law is either to realize an interest for man or to protect him from an evil, it

may be said that (*al-Masālih al-Mursalah*) (public interest) and *Sadd al-Dharā'ī*'s (precautionary measures) are adopted as important principles of Islamic law. Hence, attention may be drawn to the fact that man, in pursuing his normal life, is intended either to realize an interest or to protect himself against evil; a fact which corresponds with the Islamic law and wins its total protection as man's basic rights.

Islamic law is established in a stable framework but it does not ignore man's effort by practicing al-*Ijtihād* for the development of his life.²

(4) Justice and freedom are considered as basic rights of every single person and community so that rights are kept balanced between individuals and the community. The community is based on equality of its members, sharing rights and duties on the same ground and in favor of all as a united group.³

Furthermore, the old tribal and racial solidarity is replaced by the solidarity of the brotherhood. Therefore, helping a needy in a community is considered as a collective responsibility besides being a religious and moral virtue. For individuals constitute and support the community, and on the other hand, the community protects them

As the foundation stone of the community, an individual enjoys great position and place in Islamic law. Therefore, rules of establishing family, the mutual rights and duties of its members, the financial rights which are transmitted between them by inheritance and social rules of conduct in general, represent the main

consideration of the law.

Rules based on human rights are important not only nationally, but also internationally. These rules imply that freedom of others nations, integrity of their territories and their rights to self-determination are highly estimate. Consequently, the idea of colonization, as an imposition of power in the international relations, is prohibited.

Hence, it may be said that the Islamic concept of international relations is based on the peaceful coexistence of nations, as equal members, sharing rights and duties (similar to members of a normal family) and without discriminatory measures entitling more rights to some or depriving some from others.

Logically, it may be said that if a certain legal system has some regards to the rights and freedoms of individual, then those rights should have an import position in that law which applies to large human communities and nations. Such a consideration in Islamic law, the great attention given to the public interest of community, is pointed out by this thesis.

However, justice remains as the essential orbit within the context of which a discussion concerning human rights must be followed. For example, a legal, a political or a social system of a community may be evaluated according to the extent of justice in that community. This is well proved by Islamic history, which reports that dispensing justice rose to its peak during the reigns of the Prophet, *al-rāshidūn*

and 'Umar ibn 'Abdul-'Aziz (r.a.a.). Thereafter, it declined because the law was misapplied.⁴

The above historical precedent is another indication of the efficiency norms of Islamic law for realizing and maintaining human rights. Namely, the degree of justice increases proportionally as the law is efficiently applied.

CHAPTER FIVE